1991

Huck v. Hayes : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

RAINER F. HUCK,

Plaintiff and Respondent,

vs.

ROBERT T. HAYES,

Defendant and Appellant.

Case No. 14581

APPELLANT'S BRIEF

Appeal from Judgment of the Third Judicial District Court, Salt Lake County, State of Utah
The Honorable Maurice Harding, Judge

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vs.	:	Case No. 14581
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APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action brought by Plaintiff to compel specific performance by Defendant under the terms of an Earnest Money Receipt and Offer to Purchase, or, in the alternative, for general damages.

DISPOSITION IN LOWER COURT

This case was tried in the Third Judicial District Court in and for Salt Lake County, State of Utah, before the Honorable Maurice

Harding, sitting without a jury. On February 11, 1976, the Court grante Judgment in favor of the Plaintiff and against the Defendant for specific performance, loss of rents, credits, and attorney's fees (R-139,140).

RELIEF SOUGHT ON APPEAL

That the Supreme Court reverse the decision of the trial court by setting aside the judgment and remanding the case to the trial court for entry of judgment of dismissal in accordance with the prayer of Defendant Verified Answer to Amended Complaint.

STATEMENT OF FACTS

1. As of March, 1974, Defendant owned a Buyer's interest in a Uniform Real Estate Contract for the purchase of real property located at 1161 East Bueno Avenue, Salt Lake City, Utah (Exhibits 16-P and 18-P).

2. In early 1974, Defendant sought to sell his interests in this property for the purpose of raising money to purchase a new personal residence. During this period of time, Defendant entered into a listing agreement with A & B Realty Company, a licensed real estate broker, for the purpose of selling the property at 1161 East Bueno Avenue. Defendant dealt with A & B Realty through Marcia C. Evans, Emily West, and Lynn Austin, agents, who were employed or engaged on behalf of A & B Realty for the purpose of listing and selling the property for a commission.

3. On March 3, 1974, the Defendant signed an Earnest Money Receipt and Offer to Purchase prepared by Marcia C. Evans of A & B Realty (Exhibit 3-P).

4. Contrary to the language of the Earnest Money Receipt and Offer to Purchase, the Defendant agreed to assign to Plaintiff on or before March 8, 1974, all his interest in a Uniform Real Estate contract (Exhibit 16-P), of which Defendant was the last assignee (Exhibit 18-P; paragraph 4 of Plaintiff's Amended Complaint, R-22).

5. At no time on or prior to March 8, 1974, was there a tender of the purchase price made by Plaintiff to Defendant (R-132, paragraph 15; R-136, paragraph 11; Page 208, lines 25-28, Transcript of Proceedings).

6. On March 25, 1974, at a meeting between the Defendant, the Defendant's Attorney, Richard W. Perkins, and the Plaintiff's real estate agent, Marcia C. Evans, which meeting was held at the law offices of Richard W. Perkins, Mr. Perkins did state to Mrs. Evans that:

> ...I indicated to her at that time that Mr. Hayes was very upset, that he had indicated that prior to her coming there, that he considered them to be in default or breach of the agreement. We were giving them notice of that at that particular time. She then indicated something about liens and encumbrances of record. I indicated to her that I knew nothing about liens or encumbrances of record as of that time, but if she desired to go and look into the matter and determine supposedly what it was all about and come back and sit down and negotiate further, present another offer, that we would be glad to do that. She, at that time, left. (Page 204, lines 11-22, Transcript of Proceedings).

7. On April 15, 1974, at the law offices of Richard W. Perkin Defendant's Attorney, a meeting was held between the Defendant; Richard Perkins; Lynn Austin, and Emily West, listing agents for A & B Realty; Plaintiff; Craig S. Cook, Plaintiff's Attorney; Marcia C. Evans, selling agent for A & B Realty; and Bill Fagergran, Broker for A & B Realty. There took place a discussion in reference to liens, encumbrances, taxes insurance and purchase price, with no money being tendered by Plaintiff to Defendant.

8. On or about June 1, 1974, Plaintiff tendered to A & B Realty, the listing and selling agents, a cashier's check in the amount of $5,038.32.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING PLAINTIFF SPECIFIC PERFORMANCE UNDER THE TERMS AND CONDITIONS OF THE EARNEST MONEY RECEIPT AND OFFER TO PURCHASE.

It is the position of Defendant-Appellant in this Appeal, as it was during the trial of this matter, that the primary issue in this action is whether or not a purchaser of an interest in real property, through the avenue of purchasing an assignment of a buyer's interest in a Uniform Real Estate Contract, can withhold tender of purchase price until such time as the chain of title is perfected to the purchaser's satisfaction,

while ignoring the agreed termination date of an Earnest Money Receipt and Offer to Purchase.

In the instant case, as hereinafter set forth in Point II, both parties admit that their intent, irrespective of the writing of the Earnest Money Receipt and Offer to Purchase, was to sell and to buy a buyer's interest in a Uniform Real Estate Contract. The parties did originally designate March 8, 1974, as the expiration date of said Earnest Money Receipt and Offer to Purchase, and both parties have testified that time was of the essence in the performance of that agreement.

The Supreme Court of the State of Utah has repeatedly dealt with the issue of the obligation of a vendor to provide marketable title during the sale of a piece of property on a Uniform Real Estate Contract.

The landmark case in this area would appear to be the case of Woodard v. Allen, 1 U.2d 220, 265 P.2d 398 (1953), wherein the Court held that marketable title could only be determined as of the time the purchaser tenders that which under the contract would require vendor to transfer the title which he agreed to convey. While Woodard v. Allen dealt with a factual situation wherein the vendor sought relief from a judgment by denying the plaintiff vendor relief under a written real estate contract as opposed to a plaintiff vendee seeking to enforce the same as in the instant case, the court in citing Woodard v. Allen has repeatedly held that in order to be

relieved from the obligation to make payment under the contract, the vendee must show that there is no possibility that the vendor will ever be able to convey good title, American Savings and Loan Association v. Blomquist, 24 U.2d 35, 465 P.2d 353 (1970). In the case of Corporation Nine v. Taylor, 30 U.2d 47, 513 P. 2d 417 (1973), which, as the instant case, was an action by the purchaser seeking specific performance of a real estate contract, the court held:

> ...The law does not require the vendor to have clear and marketable title at all times during the performance of his contract, and is not ordinarily so obliged until the time comes for him to perform. The buyer should not be heard to complain unless it appears that it will be impossible or at least highly unlikely that the seller will be able to perform his contract when he is called upon to do so, which we do not see as the situation here. Complementing this is the fact that the buyer should not be heard to complain when it is his own default which is preventing fulfillment of the contract.

See also Marlow Investment Corp. v. Radmall, 26 U.2d 124, 485 P.2d 14 (1971), and Leavitt v. Blohm, 11 U.2d 220, 357 P.2d 190 (1960).

The general rule in this area as promulgated by the Supreme Court of the State of California would appear to be supportive of the posit taken by this Honorable Court. A holding which has been subsequently followed by the Supreme Court of California is that set forth in the case Anderson v. Willson, 191 Pac. 1016, 1019 (Cal. 1920), wherein the Court stated:

> ...It is the settled rule in this state that the vendor need not have even an inchoate title at the time of the contract; that he may sell land to which he has no title, and the contract will be valid and enforceable if, when the time for performance arrives, he is able to furnish the title he contracted to convey.

See also Central Mutual Insurance Company v. Schmidt, 313 P.2d 132 (Cal. 1957).

In the instant case, at the time the Defendant listed the subject property for sale with A & B Realty, he did provide to the agents of A & B Realty, Miss Austin and Miss West, a copy of an Assignment of Uniform Real Estate Contract (18-P), which states, in part:

> Know all Men by These Presents: That Reynold Nelson and Mary Jean Nelson, his wife, for value received, does hereby grant...transfer and set over unto Robert T. Hayes, all right, title, and interest in and to the Uniform Real Estate Contract dated July 3, 1964, made and executed by Stanley Katz and Emma Katz, his wife, as sellers, to Reynold Nelson and Mary Jean Nelson, his wife, as buyers.

Marcia C. Evans testified that she did on or about March 7, 1974, receive a preliminary report on the subject property (Exhibit 4-P), which report refers to a Deed of Trust executed by Stanley Katz, dated 1964, as well as a Deed recorded June 29, 1967, signed by Stanley Katz. Had the Plaintiff, or his agents, taken the recording information set forth in the preliminary report and checked the records of the County Recorder for Salt Lake County, State of Utah, they would have discovered a Warranty Deed recorded June 29, 1967, from Stanley Katz, to Thomas H. Kirschbaum and Suzanne S. Kirschbaum, the parties to whom payments were currently

being made by the Defendant Hayes. Therefore, the Plaintiff cannot complain that there was an apparent impossibility of the Defendant Hayes to convey marketable title to the property upon payment of the intended contract, for it appears from the record and the Assignment of Uniform Real Estate Contract supplied by Defendant Hayes to the Plaintiff's agents that Mr. Katz did have good title to the property at the time he entered into the subject Uniform Real Estate Contract and that he did subsequently convey his title to Mr. Kirschbaum who is currently the fee owner of the property. In fact, the only defects in the title to said property was the existence of a federal tax lien, which amount could have been offset from the tender of the purchase price, as well as two deeds made without marit status being shown, one by Stanley Katz and one by Vern Romney. These defects are certainly not sufficient to exhibit an impossibility as would be required under the law set forth in Corporation Nine v. Taylor, supra. Complementing this is the fact that the Plaintiff, himself, should not be heard to complain when it was his own fault that the Earnest Money Receij and Offer to Purchase was not fulfilled on or before March 8, 1974, due tc the fact that he chose to withhold tender of the purchase price until such time as he and his agents were able to perfect the documentation within th chain of title to their own complete satisfaction.

In the case of Fischer v. Johnson, 523 P.2d 45 (Utah 1974), this Honorable Court held that the prospective purchasers were not entitled to specific performance of an Earnest Money Agreement executed in anticipation of entering into a final contract of purchase of a restaurant, when the purchasers had failed to discharge their own duty of attempting with reasonable diligence and faith to do what the agreement required of them, including a tender of $3,000.00. This Court said:

> Nevertheless, we cannot see therein any basis upon which it could reasonably be concluded that the plaintiffs discharged the duty which the law imposes upon them of attempting with reasonable diligence and good faith to do what the agreement required of them. They did not fulfill that obligation by simply serving the notice of willingness to go forward, and yet failing to tender the required $3,000.00 payment.

This finding was made, even though "...there was undoubtedly a basis in the evidence to justify a conclusion that the actions of the defendants (vendors) created some degree of difficulty or inconvenience for the plaintiffs (purchasers)."

This Court has held in a number of cases that in order to claim specific performance, a party must either perform or tender performance in accordance with the covenants in his contract. Fischer v. Johnson, supra. See also, Nance v. Schoonover, 521 P.2d 896 (Utah 1974); Sieverts v. White, 2 U.2d 351, 273 P.2d 974; Coombs v. Ouzounian, 24 U.2d 39, 465 P.2d 356 (1970).

POINT II

THE TRIAL COURT ERRED IN THOSE FINDINGS OF FACT SET FORTH BELOW FOR THE REASON THAT NO EVIDENCE WAS ADDUCED AT TRIAL SUFFICIENT TO SUPPORT THE SAME.

1. The Fifth Finding of Fact was entered as follows:

> Utilizing the information obtained in the multiple listing service of the Salt Lake Board of Realtors, Plaintiff informed Mrs. Evans of the terms and conditions upon which he was willing to purchase the Bueno property. Plaintiff offered to pay $10,600.00 total purchase price which consisted of $100.00 earnest money, approximately $5,500.00 on delivery of a deed or final contract of sale, and to assume the prior obligation (termed as a mortgage) of approximately $5,000.00, with monthly payments of $75.00 to include taxes and insurance. Other terms and conditions were included by Plaintiff which are evidenced by the earnest money agreement. Plaintiff specifically requested that Mrs. Evans write in the date of March 8, 1974, as the proposed closing date of the sale.

No testimony or other evidence was produced at the time of trial that would support the date of March 8, 1974, as being a proposed closing date, but was, in fact, as evidenced by the Earnest Money Agreement (Exhibit 3-P), specifically and without qualification, set forth as th date of termination of the said Earnest Money Receipt and Offer to Purch

2. The Tenth Finding of Fact was entered as follows:

> This agreement was valid and binding upon the parties and was not ambiguous.

This finding was neither supported by the evidence nor could it possibly represent the intent of the parties. The Earnest Money Rece

and Offer to Purchase is couched in terms of a cash purchase, assumption of mortgage and transfer of good and marketable title. Plaintiff, however, seeks to compel Defendant's performance under the terms of a contract which he claims is valid and binding upon the parties and not ambiguous; yet, said contract, the Earnest Money Receipt and Offer to Purchase (Exhibit 3-P), makes no reference to the agreement for the purchase by Plaintiff of an interest in a Uniform Real Estate Contract of which the Defendant was the last assignee as alleged in paragraph 4 of Plaintiff's Amended Complaint (R-22). This paragraph 4 states as follows:

> That Defendant agreed to assign to Plaintiff all right, title, and interest in a Uniform Real Estate Contract of which Defendant was the last assignee and Plaintiff did agree to pay to Defendant the sum of approximately $5,000.00 and to assume the payments of the Uniform Real Estate Contract.

In addition to this admission of the Plaintiff in his Amended Complaint, there was never a question that the Defendant had anything other than an interest in a Uniform Real Estate Contract to sell. Under cross examination, the uncontroverted testimony of Defendant as set forth on pages 179 and 180 of the Transcript of Proceedings shows that at the time he listed the subject property in his meeting with Miss West and Mrs. Austin, agents of the listing and selling broker, he was very specific and clear in his explanation of what he actually owned and what he intended to sell. This testimony is as follows:

CROSS EXAMINATION

BY MR. SCHWOBE:

Q. Mr. Hayes, Mr. Cook asked you about your first meetin with real estate agents, Miss West and Mrs. Austin, I believe.

A. Yes.

Q. I will show you a document marked Plaintiff's Exhibit 18, entitled assignment of real estate contract. Did you ha the original of that document in your possession at that time?

A. Yes.

Q. Did you show it to them?

A. Yes.

Q. And what did you tell them about it?

A. I told them this is exactly what I had on the property. I was very, very careful about this. I didn't want to make any mistakes, any misunderstanding of this, that they knew exactly what I had to convey.

Q. And when you talked to Mrs. Evans on the 2nd and the 3rd, did you show her the original of that document?

A. Yes. I was running up and down the stairs getting them out of my files, the assignment of contract, and I showe it to her. She knew what was in it. I told her--laid out the whole thing in front of her.

Q. And what did she tell you at that time?

A. That there would be no problem, that they would be able to close the thing out in that March the 8th.

Defendant's position based upon the testimony of both the Plaintiff and the Defendant as well as the pleadings of both parties is that there was an agreement for the purchase and sale of an interest in a Uniform Real Estate Contract. While the Earnest Money Receipt and Offer to Purchase is certainly not clear and unambiguous on its face, it is the contention of the Defendant-Appellant that the agreement which is partially included within the Earnest Money Receipt and Offer to Purchase was intended to be performed on or before the 8th day of March, 1974, and that Plaintiff had no right, under the laws of the State of Utah, as hereinbefore discussed in Point I, to withhold or to refrain from tendering the purchase price money owed until such time as a chain of title could be perfected to Plaintiff's complete satisfaction.

3. The Fourteenth Finding of Fact was entered as follows:

> On March 7, 1974, Mrs. Evans advised Defendant of these title problems. Defendant instructed Mrs. Evans to clear them as soon as possible so that a closing could be accomplished. She agreed and contacted the Plaintiff and informed him of these problems. Plaintiff concurred that she should attempt to clear these problems as soon as possible.

This Finding was not supported by the evidence. The Defendant denied he had such a conversation by telephone or otherwise with Mrs. Evans, the agent of A & B Realty (Line 25, Page 182, to Line 3, Page 183, Transcript of Proceedings). Mrs. Evans, however, testified that upon being

informed of the deficiencies on or about March 7, Mr. Hayes said, "Just to go ahead and get it done as quickly as possible" (Lines 2-3, Page 90, Transcript of Proceedings). Mrs. Evans' own testimony shows that Defendant Hayes did not instruct her to clear them up so that a closing could be held on this specific matter, and it does not necessarily follow that if the Court believed the testimony most favorable to Plaintiff from the statement, "Just go ahead and get it done as quickly as possible", the statement was intended to waive the specific requirement of the agreement to perform on the Earnest Money Receipt and Offer to Purchase which terminated if not closed on or before March 1974.

4. The Sixteenth Finding of Fact was entered as follows:

> Plaintiff was ready, willing and able to perform his part of the earnest money agreement and acted in good faith in attempting to close the transaction at all times.

This Finding is improper for one reason that as opposed to stating a fact, it states a conclusion of law. However, even taken on its face as a conclusion of law, it is improper and contrary to the evidence and the testimony of the parties as set forth in paragraphs 11 and 12 of the Corrected Conclusions of Law (R-136).

5. The Seventeenth Finding of Fact was entered as follows:

> On March 25, 1974, Mrs. Evans conferred with defendant and his attorney, Mr. Perkins. At no time during said conference was plaintiff or his agent given notice of defendant's intent to abandon, waive, or rescind the earnest money agreement.

The evidence does not support this Finding for the reason that the only testimony wherein default and rescission are mentioned is that of Mr. Perkins, (Pages 203 and 204, Transcript of Proceedings), as follows:

> Q. Calling your attention to March 25, 1974, did you, on that day, have occasion to meet with Mr. Hayes and Mrs. Evans regarding this piece of property?
>
> A. I did.
>
> Q. Would you relate the names of the people that were present?
>
> A. Mr. Hayes, myself, and Mrs. Evans.
>
> Q. And would you describe that meeting to the best of your recollection?
>
> A. As I recall the meeting was scheduled for the morning. Mr. Hayes came to my office ahead of time. We sat down and conversed about the matter. Again, I was able to look at the Earnest Money Receipt and Offer to Purchase for the first time.
>
> We discussed that briefly and some of the problems involved. Shortly after that time Mrs. Evans came. We waited for a period of time as it was represented that Mr. Huck would be there. He did not show up.
>
> I went back to my office and worked on other matters for approximately 45 minutes. I came back out into the waiting

room where Mr. Hayes was sitting and also Mrs. Evans. I says, "Bob", I says, "I've got other commitments and things to do. Are we going to have a closing? What's going on?"

Mrs. Evans then apologized for the delay, requested that she use the telephone to see if she could locate Mr. Huck. She came back and indicated she had not been successful. We then discussed briefly, I think, in the waiting room, prior to her going out the door, and I indicated to her at that time that Mr. Hayes was very upset, that he had indicated that prior to her coming there that he considered them to be in default, or breach of the agreement.

We were giving them notice of that at that particular time. She then indicated something about liens and encumbrances of record. I indicated to her that I knew nothing about liens and encumbrances of record as of that time, but if she desired to go and look into the matter and determine supposedly what it was all about and come back and sit down and negotiate further, present another offer, that we would be glad to do that. She at that time left.

6. The Twenty-Second Finding of Fact was entered as follc

It was then mutually agreed among all parties that the tax lien should be officially released and that a correct balance of defendant's equity in the property should be obtained from the banks by recomputing the taxes and insurance from the previous seven years. Richard Perkins, defendant's attorney, specifically stated that it would be impossible to close the transaction until these matters were concluded.

The Twenty-Third Finding of Fact was entered as follo

It was then mutually agreed by all the parties present, including defendant and defendant's attorney, Richard Perkins, that Marcia Evans should secure a release of

> the tax lien and take any steps necessary to obtain a corrected balance satisfactory to both Dr. Kirschbaum and defendant.

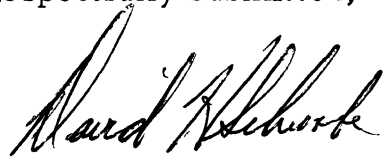
Findings of Fact Twenty-Two and Twenty-Three are improper for the reasons that they include a conclusion of law, "It was then mutually agreed among all parties", and, further, they are not supported by the evidence in that they imply that any agreement among the parties to clear the tax lien upon the property and to correct the balance of the defendant's equity was an agreement to close, pursuant to the terms of the Earnest Money Receipt and Offer to Purchase, which, by its very terms, terminated on March 8, 1974. In fact, the Findings themselves set forth and substantiate the testimony of Mr. Perkins (Lines 15-22, Page 204, Transcript of Proceedings), that Mrs. Evans was informed the matter could be renegotiated and, also, the Findings do provide that defendant's equity is to be recomputed, taking into consideration the tax lien on the property, as well as adjustments due to computation of taxes and insurance from the previous seven years.

CONCLUSION

It is the position of the Defendant-Appellant that the Plaintiff did not perform in accordance with the Earnest Money Receipt and Offer to Purchase (Exhibit 3-P), by discharging his duty to tender Defendant's equity on or before March 8, 1974. Therefore, Plaintiff is not entitled

to a judgment of specific performance, and the Defendant-Appellant respectfully urges the Court to reverse the decision of the trial court by setting aside the judgment and remanding the case to the trial court for entry of judgment of dismissal in accordance with the prayer of the Defendant's Verified Answer to Amended Complaint.

Respectfully submitted,



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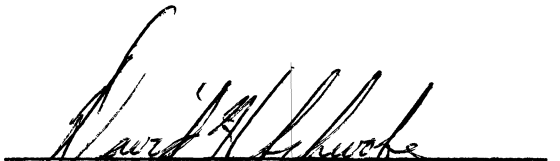
CERTIFICATE OF SERVICE

I hereby certify I served three copies of the foregoing Appellant's Brief, by mailing the same, postage prepaid, to Craig S. Cook, Attorney for Plaintiff-Respondent, at the 7th Floor, Continental Bank Building, Salt Lake City, Utah 84101, this 2nd day of September, 1976.



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